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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

MARTHA HERRERA,

Plaintiff and Appellant,

v.

CITY OF SAN JOSE,

Defendant and Appellant.

H042211

(Santa Clara County

Super. Ct. No. 1-10-CV-165689)

In this action for dangerous condition and inverse condemnation against the City of San Jose (City), a jury awarded damages to plaintiffs Martha Herrera and her daughters. Both the City and Herrera appeal from the judgment: The City contends that res judicata barred Herrera from recovering for property damage because her insurer had already settled with the City; Herrera contends that the court improperly offset her recovery by the amount of that settlement. Herrera also appeals from the subsequent order limiting her attorney fees, costs, and prejudgment interest. We will affirm the judgment and postjudgment order.

Background

1. Events Culminating in the Verdict

On April 6, 2008, Herrera lived with her daughters, plaintiffs Michelle and Jessica Rodriguez, in her home on Mossall Way in San Jose. In the early morning that day, raw sewage from the City's main sewer line flooded most of the first floor. Mark Hunter, a plumbing consultant testifying at trial as an expert in the field of sewer mains and

backflows, explained that a sag in the sewer line had allowed the accumulation of debris until a blockage occurred, resulting in a diversion of flow. Upon inspection and cleaning that day, grease was found to have caused a stoppage.¹ In addition, the backflow valve at Herrera's home was not working properly; those valves tended to function correctly about 50 percent of the time.

Herrera was insured by California State Automobile Association (CSAA), which accepted her claim. The policy carried limits of \$329,000 for the dwelling, \$230,300 for personal property, and \$65,800 for loss of use. Deanna Thompson, a file handler for CSAA, testified that she told Herrera that she was not sure if there would be coverage; if this turned out to be an "off-premises sewage loss," then Herrera might have to file a claim with the City.² After mitigation of the damage, the company sent Herrera a check for \$12,480.13, the amount it calculated to cover structural repairs, less the homeowner's \$1,000 deductible. The following month additional payments of \$3,898.82 and \$2,877 were made to Herrera for crawl space mitigation and the fair rental value of her home, respectively. It was only after September 18, 2008 that the file was finally closed on the claim.

A month after the incident Robert Wall, a CSAA attorney, talked to Herrera. From that conversation Herrera inferred that CSAA was going to represent her in "a separate complementary lawsuit against the City." For the first two years after the loss, she thought CSAA attorneys were representing her. It was only later that she learned that the insurer and the City had settled the property damage claims without her involvement. Myles Corcoran, Herrera's expert in construction consultation and water

¹ Hunter also testified that a backup had occurred in 2005, causing a "spill" confined to the bathroom. The witness stated that the City did not investigate the problem on that occasion, so the cause of that diversion was not determined.

² Thompson explained that despite her uncertainty she "chose to assist Ms. Herrera because she was upset." Herrera, however, testified that Thompson told her that her policy would not cover the loss; it was the City's responsibility.

damage, testified on cross-examination that it would not have taken longer than about two months to repair the damage to the home. However, the house was still vacant by the time of trial.

In August 2008 CSAA submitted a claim against the City with the City Clerk, seeking reimbursement for the amounts it had paid to Herrera for the damage to her home, which it asserted was attributable to the City's "[f]ailure to inspect, maintain and repair [the] city sewer main." On October 7, 2008 Herrera submitted a government claim with the City Clerk "to complement what [her CSAA] policy does not cover." Herrera requested \$36,088.15, plus an unknown amount for future costs.

In November 2008 CSAA filed a complaint in subrogation against the City, alleging inverse condemnation and dangerous condition of public property. In September 2009 those parties settled the action: CSAA released the City from all current and future claims in exchange for the City's payment of \$60,000. That lawsuit was dismissed with prejudice on October 30, 2009.

On March 8, 2010, Herrera and her daughters filed their action against the City, claiming property damage and personal injury. In their second amended complaint, filed August 28, 2013 by conditional stipulation,³ plaintiffs alleged negligence in the maintenance and control of the main sewage line, dangerous condition of public property, and inverse condemnation.

Before trial began on November 10, 2014, the court heard motions in limine. Plaintiffs' counsel asked the court to exclude as a collateral source the payments she had received from CSAA and disability payments she had received through her employment. Counsel noted that the payment from CSAA could later be credited against the recovery; but to allow it to come into evidence at trial would be "so prejudicial" against plaintiffs.

³ The parties agreed that plaintiffs would be permitted to file a second amended complaint to add a cause of action for inverse condemnation, but any attorney fee award would be limited to those "incurred or accrued" after that filing date.

In the City's motion it requested a ruling barring all of plaintiffs' claims of property damage based on res judicata and excluding all evidence of property damage. According to the City, the second amended complaint violated the rule against splitting a cause of action because CSAA had resolved "the very same property damage claims" presented by plaintiffs. Consequently, the City argued, the jury should hear only personal injury damages and not be prejudiced by evidence of property damage.

The court allowed the jury to hear evidence of the \$60,000 settlement, and defense counsel urged the jury to find that Herrera had already been compensated for the property damage. As to the City's motion, the court denied it without prejudice, saying it could not "dispose of an entire cause of action through the vehicle entitled motion in limine."

The jury found in plaintiffs' favor by separate verdicts. On Herrera's claim of dangerous condition of public property, it awarded her \$360,016.08, of which \$150,493.33 was for property damage. Jessica Rodriguez's damages of \$40,958.33 for dangerous condition included \$958.33 for property damage, while \$125 of Michelle Rodriguez's \$25,541.67 recovery was for property damage. Finally, as to the inverse condemnation claim, the jury found that \$110,166.67 of the damage to Herrera's real property was caused by the blockage in the City's sewer main. Upon inquiry by the court, the jurors affirmed that this \$110,166.67 was included in the \$150,493.33 of property damage in the cause of action for dangerous condition.

2. Posttrial Motions

The court entered judgment on the verdict on January 28, 2015. Two days later the City filed multiple posttrial motions: a motion to offset the judgment by \$60,000, the amount of its settlement with CSAA; a motion for judgment notwithstanding the verdict (JNOV) on the inverse condemnation claim; a motion for JNOV on the dangerous condition claim; a motion for reduction of damages, or alternatively, a new trial; and a motion to stay enforcement of the judgment pending the outcome of the other three

motions. The trial court granted the stay motion and the motion to offset the judgment but denied the motions for JNOV and a new trial.

On March 27, 2015 Herrera individually moved for costs and attorney fees. She initially requested \$42,056.45 in expert “engineering and appraisal costs”⁴ pursuant to Code of Civil Procedure section 1036,⁵ “ordinary” costs of \$16,736.31 under section 1033.5, prejudgment interest of \$52,608.36, and attorney fees of \$450,915. In her reply to the City’s opposition, Herrera reduced her claim of attorney fees to \$395,940 to correct errors in counsel’s initial calculations.⁶

The court continued the hearing to allow Herrera to submit additional evidence to support her claim of inverse condemnation costs; but the supplemental evidence included \$13,888.11 that had not been claimed in the initial motion. Those were disallowed. The court also denied section 1036 costs of \$14,999.45 because they were not shown to be reasonably related to the inverse condemnation claim, along with expert deposition costs that had already been paid by the City. Subtracting those amounts left \$25,482.09 in expert costs that were granted under section 1036. As to prejudgment interest, the court calculated the amount based on the \$50,166.67 inverse condemnation award (after the offset), yielding \$23,956.30. Attorney fees were awarded in the amount of \$20,066.67, representing 40 percent of Herrera’s \$50,166.67 recovery pursuant to the contingent fee agreement she had with her attorney.

⁴ Counsel later amended the request for those costs to specify \$55,944.36. The trial court disallowed the additional \$13,888.11 because those costs had not been included in the initial motion and were beyond the scope of the court’s earlier oral permission to supplement the evidence.

⁵ All further statutory references are to the Code of Civil Procedure except as otherwise indicated.

⁶ Herrera made the correction to delete \$9,975 for mistakenly entered amounts as well as \$44,998.50, the fees incurred prior to the second amended complaint. As noted earlier, Herrera had waived any claim to those fees when the City agreed to her filing of the second amended complaint. In her briefs on appeal, however, Herrera inexplicably returns to the full claim of \$450,915.

The City filed a timely notice of appeal from the judgment. Herrera timely appealed from the judgment and from the postjudgment order.

Discussion

1. The City's Appeal

Renewing the contention it advanced in its motion in limine, the City asserts that Herrera was not entitled to any damages for property damage because CSAA had already recovered for that harm in the settlement and dismissal of its subrogation action. By including this claim in her lawsuit, the City argues, Herrera was improperly splitting a cause of action that was barred by res judicata.

Herrera responds, as she did below, that the City has waived the defense of res judicata; and in any event, the doctrine is inapplicable in the circumstances presented. The City's defense, however, was not waived or forfeited. Even if it failed to assert res judicata sufficiently in its initial answer, the trial court properly granted the City leave to file an amended answer that specifically included this doctrine as an affirmative defense. The court noted that this had already been an issue between the parties, so plaintiffs would incur no prejudice from the amendment. This ruling was well within the scope of the court's discretion.

The aspect of res judicata generally referred to as claim preclusion provides that "a valid, final judgment on the merits precludes parties or their privies from relitigating the same 'cause of action' in a subsequent suit." (*Le Parc Community Assn. v. Workers' Comp. Appeals Bd.* (2003) 110 Cal.App.4th 1161, 1169; accord, *City of Oakland v. Oakland Police & Fire Retirement System* (2014) 224 Cal.App.4th 210, 227.) The doctrine may be triggered when a party attempts to split a cause of action based on a single primary right into separate suits. "Claim preclusion arises if a second suit involves (1) the same cause of action (2) between the same parties (3) after a final judgment on the merits in the first suit." (*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 824 (*DKN*).) However, "[e]ven if these threshold requirements are established, res judicata

will not be applied ‘if injustice would result or if the public interest requires that relitigation not be foreclosed. [Citations.]’ [Citation.]” (*Citizens for Open Access etc. Tide, Inc. v. Seadrift Assn.* (1998) 60 Cal.App.4th 1053, 1065 (*Citizens*).) The applicability of res judicata is a question of law. (*Allstate Ins. Co. v. Mel Rapton, Inc.* (2000) 77 Cal.App.4th 901, 907 (*Mel Rapton*).) It is the party asserting res judicata who has the burden of demonstrating that the requirements of the doctrine are satisfied. (*Hong Sang Market, Inc. v. Peng* (2018) 20 Cal.App.5th 474, 489.)

“The rule against splitting a cause of action is based upon two reasons: (1) That the defendant should be protected against vexatious litigation; and (2) that it is against public policy to permit litigants to consume the time of the courts by relitigating matters already judicially determined, or by asserting claims which properly should have been settled in some prior action . . . ‘It is not the policy of the law to allow a new and different suit between the same parties, concerning the same subject-matter, that has already been litigated; neither will the law allow the parties to trifle with the courts by piecemeal litigation.’ ” (*Wulfjen v. Dolton* (1944) 24 Cal.2d 891, 895.) Accordingly, “all claims based on the same cause of action must be decided in a single suit; if not brought initially, they may not be raised at a later date. . . . A predictable doctrine of res judicata benefits both the parties and the courts because it ‘seeks to curtail multiple litigation causing vexation and expense to the parties and wasted effort and expense in judicial administration.’ [Citation.]” (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 897, italics omitted.)

In renewing its assertion of the doctrine on appeal, the City emphasizes that both CSAA’s and Herrera’s actions sought recovery for property damage under the theories of dangerous condition of public property and inverse condemnation. Herrera does not dispute this procedural fact; instead, she contests the element of privity. That, too, is an issue of law if based on undisputed facts. (*Citizens, supra*, 60 Cal.App.4th at p. 1070.)

“ ‘Privity is not susceptible of a neat definition, and determination of whether it exists is not a cut-and-dried exercise,’ ” but calls for a “ ‘ “close examination of the circumstances of each case.” [Citation.]’ ” (*Citizens, supra*, 60 Cal.App.4th at p. 1070.) “As applied to questions of [claim] preclusion, privity requires the sharing of ‘an identity or community of interest,’ with ‘adequate representation’ of that interest in the first suit, and circumstances such that the nonparty ‘should reasonably have expected to be bound’ by the first suit. [Citation.]” (*DKN, supra*, 61 Cal.4th at p. 826.) “ ‘Privity involves a person so identified in interest with another that he represents the same legal right. [Citations.]’ ” (*Dawson v. Toledano* (2003) 109 Cal.App.4th 387, 399.)

“ ‘ “The determination whether a party is in privity with another . . . is a policy decision” ’ ” which encompasses considerations of due process. (*Rodgers v. Sargent Controls & Aerospace* (2006) 136 Cal.App.4th 82, 91.) “ ‘ “Due process requires that the nonparty have had an identity or community of interest with, and adequate representation by, the . . . party in the first action. [Citations.] The circumstances must also have been such that the nonparty should reasonably have expected to be bound by the prior adjudication.” ’ ” (*Citizens, supra*, 60 Cal.App.4th at p. 1070.)

“A party is adequately represented for purposes of the privity rule ‘if his or her interests are so similar to a party’s interest that the latter was the former’s virtual representative in the earlier action. [Citations.]’ . . . We measure the adequacy of ‘representation by inference, examining whether the . . . party in the suit which is asserted to have a preclusive effect had the same interest as the party to be precluded, and whether that . . . party had a strong motive to assert that interest. If the interests of the parties in question are likely to have been divergent, one does not infer adequate representation and there is no privity. [Citations.] If the . . . party’s motive for asserting a common interest is relatively weak, one does not infer adequate representation and there is no privity.’ ” (*Citizens, supra*, 60 Cal.App.4th at pp. 1070-1071.) “In the final analysis, the

determination of privity depends upon the fairness of binding [the nonparty] with the result obtained in earlier proceedings in which it did not participate.” (*Id.* at p. 1070.)

The circumstances presented in this case support the trial court’s determination that *res judicata* should not be applied. At trial Robert Wall, the attorney who represented CSAA in its action against the City, acknowledged that typically the insured would sue before the insurer filed its subrogation action; he did not know why the sequence was reversed in this case. Wall could not recall whether he told Herrera that he was going to represent her interest as well as the insurer’s in the case against the City. Herrera, however, testified that when Wall contacted her, he led her to understand that he was going to help her recover for her losses by representing her in a “separate complementary lawsuit against the City.” The trial court could have found Herrera credible in her testimony that she not only was unaware of the settlement between the City and CSAA until after it was completed but believed that Wall was representing her interests. Based on these specific circumstances, the court could reasonably find that under the principles governing privity, Herrera had not been adequately represented and therefore that it would not be fair to bind her to the judgment reached by CSAA and the City.

The decisions on which the City relies are inapposite in the procedural posture of this case. *Mel Rapton*, for example, upheld the application of *res judicata* in the *insurer’s* action against the tortfeasor *after* the policyholder had recovered in small claims court. The Third Appellate District confirmed that after being only partially compensated for a loss by the insurer, the insured “retains the right to sue the responsible party for any loss not fully compensated by insurance, and the insurer has the right to sue the responsible party for the insurer’s loss in paying on the insurance policy.” (*Mel Rapton, supra*, 77 Cal.App.4th at p. 908.) The court acknowledged that “[i]t is unreasonable for a tortfeasor to expect a settlement and release of all claims to bind a known entity who was not a party to the settlement and was not given an opportunity to take part in the settlement.

The tortfeasor cannot knowingly exclude the insurer from a voluntary settlement and then claim the release bars a subsequent action by the insurer.” (*Id.* at p. 912.) This rationale was inapplicable to defendant Mel Rapton because—unlike the City here—it had not participated in any settlement with the insured; on the contrary, it was sued in small claims court and obviously had not agreed to have judgment entered against it. The rule against splitting was applicable to the insurer, which could have protected its subrogation rights through its agreement with the insured when it paid her insurance claim. Herrera had no such opportunity; she was not even aware of the action and settlement and had no opportunity to act to preserve her litigation rights against the City.

Steigerwald v. Godwin (1956) 144 Cal.App.2d 591 is even less helpful. That was a contract action in which the defendant, a general contractor, was denied recovery on his cross-claim against the plaintiff subcontractor. The insurer and the plaintiff settled the insurer’s action for fire damage to defendant’s property, at which point the defendant’s attorney learned about the settlement. The appellate court held that the subrogation agreement with the insurer assigned to the insurer *all* “rights, claims, demands, and interest which the [defendant contractor] has or may have against any parties” for the contractor’s damages. The agreement further authorized the insurer to settle those claims and act as “attorney-in-fact for the undersigned [contractor] for said purposes and to sign releases . . . that may be necessary in the prosecution, litigation or settlement of said claims.” (*Id.* at p.594.) Further, the defendant had agreed not to pay the subcontractor plaintiff his bill until the various insurers’ actions in federal court had terminated, and defendant had actively participated in that federal litigation even though he was not named as a party. (*Id.* at 593.) These facts justified application of the rule against splitting by the defendant, but they are clearly distinguishable from the circumstances faced by Herrera.

Intri-Plex Techs. v. Crest Group, Inc. (2007) 499 F.3d 1048 is factually more analogous. There the insurer first settled its subrogation action against the defendant, and

the insured then filed a complaint containing the same causes of action against the defendant. The federal district court granted the defendant's motion to dismiss based on the plaintiff's impermissible splitting which resulted in the bar of res judicata. On the presumed existence of privity between insured and insurer, the Ninth Circuit affirmed. The plaintiff, the appellate court held, was indisputably aware of the insurer's complaint against the defendant but failed to intervene to protect its rights.⁷ Consequently, the plaintiff "cannot benefit from the rule that a tortfeasor with knowledge of an insurer's subrogation claim may not settle the entire cause of action by settling only with the insured and thereby foreclose a subsequent action by the insurer." (*Id.* at p. 1056.) Because we have concluded that the element of privity was absent in this case, *Intri-Plex* is not persuasive authority for reversal of the superior court's determination on res judicata grounds.

2. *Herrera's Appeal*

a. *The Insurance Offset*

As noted, among the parties' motions in limine was plaintiffs' request to exclude references to payments by CSAA, which plaintiffs regarded as a collateral source. Plaintiffs' counsel argued that evidence of these payments was "hugely prejudicial," as the City wanted to use the \$60,000 payment to show that Herrera failed to mitigate her damages—i.e., that she "blew the money" instead of using it to repair her home. Counsel urged the court not to allow this payment to influence the jury. The court denied the motion. In his closing argument to the jury the Chief Deputy City Attorney, Ardell Johnson, emphasized the remediation applied within a few days of the flooding and Herrera's failure to restore her home within the eight weeks it would have taken to make repairs. Instead of mitigating her damages, Johnson argued, Herrera waited until after

⁷ The court made a point of noting that unlike an insurer, the insured had no subrogation rights to protect from fraud.

CSAA's settlement with the City to seek "duplicative damages" for the same losses it had paid to CSAA. Johnson therefore urged the jury to find no additional liability, but if it found any damages, that should be limited to \$2,700 for the rental value of her home for eight weeks, plus \$12,500 to put her home back together—but the "end result," Johnson argued, "should be 0, because she already received that money. And the City should not have to pay twice."

After the jury rendered its verdict for plaintiffs, the City moved for a credit against the property damage award for the \$60,000 it had paid CSAA. Herrera opposed the motion. In her view, had the court granted her motion in limine to exclude that evidence, then the City would be entitled to the offset; however, here the jury was allowed to consider the evidence and took the payment into account in its verdict. Unless the City could show that the subrogation evidence was in fact *not* considered by the jury, it should not receive a "double credit."

The court granted the City's motion. On appeal, Herrera contends that the offset applied by the court from the "collateral payment" by CSAA gave the City "an unwarranted double credit of \$120,000," which amounted to a "second 'bite of the apple' " and essentially impeached the jury's verdict. We disagree.

"[T]he collateral source rule 'provides that if an injured party received some compensation for his injuries from a source wholly independent of the tortfeasor, such payment should not be deducted from the damages which the plaintiff would otherwise collect from the tortfeasor.' " (*Cuevas v. Contra Costa County* (2017) 11 Cal.App.5th 163, 181, quoting *Hrnjak v. Graymar, Inc.* (1971) 4 Cal.3d 725, 729.) The rule "expresses a policy judgment in favor of encouraging citizens to purchase and maintain insurance for personal injuries and for other eventualities. Courts consider insurance a form of investment, the benefits of which become payable without respect to any other possible source of funds. If we were to permit a tortfeasor to mitigate damages with payments from plaintiff's insurance, plaintiff would be in a position inferior to that of

having bought no insurance, because his payment of premiums would have earned no benefit. Defendant should not be able to avoid payment of full compensation for the injury inflicted merely because the victim has had the foresight to provide himself with insurance.” (*Helfend v. Southern California Rapid Transit Dist.* (1970) 2 Cal.3d 1, 10.)

“The collateral source rule has an evidentiary as well as a substantive aspect. Because a collateral payment may not be used to reduce recoverable damages, evidence of such a payment is inadmissible for that purpose. Even if relevant on another issue (for example, to support a defense claim of malingering), under Evidence Code section 352 the probative value of a collateral payment must be ‘carefully weigh[ed] . . . against the inevitable prejudicial impact such evidence is likely to have on the jury’s deliberations.’ (*Hrnjak v. Graymar, Inc.* (1971) 4 Cal.3d 725, 732.)) Admission of evidence of collateral payments may be reversible error even if accompanied by a limiting instruction directing the jurors not to deduct the payments from their award of economic damages. (*Id.* at pp. 729, 734.)” (*Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, 552.)

One limitation of the rule’s application, however, is “the competing interest, also well recognized by our courts, that a defendant may not be subjected to double liability.” (*Ferraro v. Southern Cal. Gas Co.* (1980) 102 Cal.App.3d 33, 46 (*Ferraro*) [superseded by statute on another point as stated in *Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1337.]; *Garbell v. Conejo Hardwoods, Inc.* (2011) 193 Cal.App.4th 1563, 1572.) Thus, “when an insurance carrier becomes subrogated to the claim of an insured against a third party tortfeasor, the payment of insurance proceeds is no longer a ‘collateral source.’ ” (*Ferraro, supra*, at p. 47.) In those circumstances, designating the receipt of insurance benefits as a collateral source would impermissibly subject the tortfeasor to “potential double liability.” (*Ibid.*; see *Ventura County Employees’ Retirement Association v. Pope* (1978) 87 Cal.App.3d 938, 951 [“Only one totality of recovery of damages for personal injuries is allowed, and only one totality of liability may be imposed on the tortfeasor.”])

Herrera contends that “it was incumbent upon the City to show that the admitted and argued subrogation claim evidence was *in fact* not considered by the jury. This they cannot do.” Consequently, she argues, once the CSAA payments were admitted into evidence, there should have been no offset. She calls attention to the City’s assertion in closing argument that she had already been fully compensated by CSAA.

On appeal, however, it is Herrera’s burden, not the City’s, to show error. On this record we cannot assume that the jury subtracted the CSAA insurance payment from its calculation of the total amount in property damage suffered by Herrera. The evidence of the \$60,000 payment was used in defense counsel’s closing argument to convince the jury that remediation of the property damage was not worth more than the amount Herrera had received from CSAA, and that Herrera could have mitigated her damages by allowing an eight-week repair, but instead decided to “leverage” the money to remodel rather than restore her home. As for the calculation of damages, the court adequately instructed the jurors that they must “decide the total amount of Plaintiffs’ damages” and then reduce that figure by the percentage of responsibility the plaintiffs bore for those damages. They were also told that they must follow the court’s instructions and base their decision on the facts they found true from the evidence and on the law given by the court rather than on the attorneys’ arguments. We must presume that the jurors followed those instructions and did not deduct the insurance payment from what they found to be the total amount representing Herrera’s property damage. Viewed in this light, the subsequent offset was proper.

b. Attorney Fees

The trial court allowed Herrera \$50,166.67 in damages for the inverse condemnation—the jury verdict of \$110,166.67 less the \$60,000 CSAA payment—and, as noted, \$20,066.67 for the attorney fees she “actually incurred” in prosecuting this cause of action, pursuant to section 1036. The court calculated this fee award as 40 percent of the \$50,166.67 damages award, in accordance with plaintiffs’ contingency

fee agreement with her attorneys. On appeal, Herrera argues that the fees “actually incurred” within the meaning of the statute should have been based on the time spent by trial counsel on the inverse condemnation cause of action. That method would have allowed a fee award of \$450,915 (or \$395,940; see fn. 6, *ante.*)

Section 1036 states: “In any inverse condemnation proceeding, the court rendering judgment for the plaintiff by awarding compensation, or the attorney representing the public entity who effects a settlement of that proceeding, shall determine and award or allow to the plaintiff, as a part of that judgment or settlement, a sum that will, in the opinion of the court, reimburse the plaintiff’s reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of that proceeding in the trial court or in any appellate proceeding in which the plaintiff prevails on any issue in that proceeding.” We review the attorney fee award for abuse of discretion. (*Lafitte v. Robert Half Internat., Inc.* (2016) 1 Cal.5th 480, 488.)

Herrera insists that the court should have measured attorney fees “actually incurred” by the lodestar method. She relies on *Salton Bay Marina, Inc. v. Imperial Irrigation Dist.* (1985) 172 Cal.App.3d 914. In that case, it was the *defendant* irrigation district that was challenging the fee award as *excessive*; the district argued for a figure of \$241,000, based on time spent by the attorneys and other factors, but the award by the trial court was based on the court’s modification of a contingency agreement with the plaintiff, resulting in an award of nearly \$3 million. Division One of the Fourth Appellate District, reversed, observing that the fees must be not only “actually incurred,” but also reasonable, “to protect the public from both unreasonable fee awards [and] fee awards that bear no relationship to the amount of attorney time actually incurred in the preparation and trial of the case.” (*Id.* at p. 954.) Thus, according to the appellate court, the trial court should award a prevailing plaintiff the “actual attorney fees he or she incurred to the extent the fees are reasonable, e.g., [*sic*] to the extent the number of hours

actually expended were reasonably necessary and to the extent the hourly rate actually charged was reasonable[,] both of these being objective measures.” (*Id.* at pp. 954-955.) The court thus found that the fee award of more than \$4 million based on the contingency agreement (40 percent of the total damages recovered) was not reasonable.

The Third Appellate District reached a different conclusion. In *Andre v. City of West Sacramento* (2001) 92 Cal.App.4th 532 (*Andre*) the plaintiff had a contingency agreement, but she refused to disclose it, and she presented no evidence showing the actual fees she had incurred beyond her declaration outlining her attorneys’ hourly rates and the time they had spent on the case. The trial court declined to consider the contingency agreement critical to the amount of reasonable fees. It applied the analysis of *Salton Bay Marina* and awarded the plaintiff \$54,017.33 on the \$10,587.50 verdict. On appeal, the Third Appellate District focused on the requirement in section 1036 that the fees be not only reasonable but “actually incurred.” (*Id.* at pp. 536-537.) The court did not reject *Salton Bay Marina* but set a “ceiling” of the amount of fees actually incurred. (*Id.* at p. 537.) Accordingly, “fees may be reduced because they are unreasonable and pose an unnecessary burden on public funds, but they cannot be increased beyond what was ‘actually incurred.’ ” (*Ibid.*) The appellate court remanded the matter for a determination of how much, if any, the plaintiff had actually incurred in attorney fees, and whether that amount was reasonable.

The Third Appellate District reaffirmed its reasoning in *Andre* almost 15 years later, in *Pacific Shores Property Owners Assn. v. Department of Fish & Wildlife* (2016) 244 Cal.App.4th 12, 58. There the court did have evidence of a contingency agreement; but the plaintiff property owners, like Herrera, relied on *Salton Bay Marina* in urging the court to determine the amount of reasonable fees even if they exceeded the amount incurred under the contingency agreement. (*Id.* at pp.61-62.) The court explained that if the amount determined by the contingency agreement exceeded what was reasonable, it could be reduced; but that amount also acted as a cap, beyond which attorney fees could

not be imposed on the public entity. (*Ibid.*) Thus, the Third Appellate District again rejected the theory that a fee award under section 1036 could be higher than the amount agreed upon between attorney and client. (Cf. *Avenida San Juan Partnership v. City of San Clemente* (2011) 201 Cal.App.4th 1256, 1282 [words “actually incurred” in section 1036 preclude application of a multiplier and preclude recovery for legal work performed by one of the plaintiffs].)

Herrera aptly recognizes that in *Salton Bay Marina* the appellate court’s rejection of the trial court’s calculation of attorney fees was not because those fees were *inadequate*, as Herrera contends here, but because the trial court’s formula (and even more so, the contingency agreement) generated an amount far exceeding what was reasonable. Herrera agrees that “the fees actually incurred are a ceiling to any fee award; fees may be reduced because they are unreasonable and pose an unnecessary burden on public funds, but they cannot be increased beyond what was actually incurred.” Her interpretation of “actually incurred,” however, suggests a different result than the one reached in *Andre*. Indeed, Herrera asks this court to reject *Andre* as a decision that “ignore[s] the merits of the claim, produces absurd results and defies the mandate of ‘reasonableness’ identified in the statute.”

We agree with the Third Appellate District’s reasoning. Although sympathetic to the regard for fairness and reasonableness expressed by Herrera, we cannot ignore the language of section 1036. The statute does not provide for fees based on the value of the effort expended by a plaintiff’s attorney, but limits the recoverable fees to the amount actually incurred by the *plaintiff*.⁸ As in *Andre* and *Pacific Shores*, here the court

⁸ To the extent that the *Salton Bay Marina* court based its reading of the statute on “attorney time actually incurred in the preparation and trial of the case” (*Salton Bay Marina, supra*, 172 Cal.App.3d at p. 954, italics added), we note that the current version of section 1036 (like its predecessor) does not explicitly refer to attorney time; instead, it permits reimbursement of the *fees* the *plaintiff* actually incurred.

properly declined to apply the time-spent calculation method advocated by Herrera and limited her recovery to what she actually incurred under the terms of her contingency agreement with her legal counsel— i.e., 40 percent of the \$50,166.67 the court deemed recoverable for the inverse condemnation cause of action after subtracting the \$60,000 from the \$110,166.67 verdict.⁹

c. Expert Costs

Herrera also sought \$42,056.45 for expert costs under section 1036, arguing that they were “reasonably necessary to successfully prosecute the inverse condemnation claim,” and that she “could not have succeeded in the inverse condemnation claim without retaining these experts.” In its opposition, the City pointed out that the request consisted of only a list of four consultants and the amounts paid. The City protested that there was no indication in the list of “why, when, and how the charges were incurred” that would provide a basis for determining the reasonableness of the amount and nature of the request, particularly since only those costs associated with the inverse condemnation claim were permitted. At the hearing on the request, Herrera’s counsel pointed out that expert fees are often incurred before a case is filed, “to see if you have a case,” so the court should not restrict expert costs to the period after the inverse condemnation claim was added. Trial counsel offered to be subjected to cross-examination regarding the time and purpose of the expert costs, but defense counsel opposed the suggestion and insisted that the entire request for costs, including the supplemental \$13,888.11, should be denied as untimely. Moreover, defense counsel argued, there was no showing that the costs were related to the inverse condemnation

⁹ We note that the court based the fee award on the Herrera’s recovery after deducting the full \$60,000 CSAA settlement, rather than on the verdict as found by the jury. Herrera does not complain of error in this specific respect, however, so we will not address it.

claim rather than to the dangerous condition claim. Herrera’s counsel represented that they were indeed “for the purpose of prosecuting the inverse condemnation claim.”

In its ruling the court agreed with the City that both the initial request and the supplemental one were insufficient, as the claimed expert costs were unsupported by sufficient evidence that they were “actually incurred and related to the inverse condemnation cause of action.” The court therefore approved part of Herrera’s request for expert costs; it allowed \$25,482.09 of the initial request of \$42,056.45¹⁰ under section 1036, while rejecting \$14,999.36, which was attributable to costs incurred before adding the inverse condemnation cause of action and to expert deposition costs the City had already paid.¹¹

On appeal, Herrera contends that she was entitled to the entire \$42,056.45 pursuant to section 1036. However, she has demonstrated no abuse of discretion or insufficiency of the evidence relied on by the court in its limitation of the expert costs to those “actually incurred” in the prosecution of the inverse condemnation cause of action. In its order the court excluded only the costs associated with the cause of action for dangerous condition and the duplicative deposition fees. Herrera has not demonstrated error on this record.

d. Ordinary Costs

Herrera separately requested ordinary costs of \$16,736.31 under Code of Civil Procedure section 1033.5. The City responded that the request was untimely and therefore waived, and the trial court did not include them in its postjudgment order. Citing *Ferrell v. County of San Diego* (2001) 90 Cal.App.4th 537, Herrera renews her

¹⁰ The court made a minor arithmetic error, identifying the claimed amount as \$42,056.85.

¹¹ Herrera’s supplemental request of \$13,888.11—added due to a “clerical error”—was denied “because they were not included in the initial motion and are beyond the scope of this Court’s verbal [*sic*] leave . . . allowing Plaintiff to supplement her evidence.”

assertion that all of her “normal costs” were recoverable under section 1036. However, she offers no developed argument that addresses the City’s assertion of untimeliness and shows how *Ferrell* supports her position. We find no basis for concluding that the trial court abused its discretion in denying Herrera her ordinary costs.

e. Prejudgment Interest

It was undisputed that Herrera was entitled to prejudgment interest on the inverse condemnation award from the time the property damage occurred. (Civ. Code, § 3287; *Customer Co. v. City of Sacramento* (1995) 10 Cal.4th 368, 390; *Smith v. County of L.A.* (1989) 214 Cal.App.3d 266, 290.) They disagreed, however, on the benchmark by which that interest should be calculated. Herrera asserted that she was entitled to interest based on the \$110,166.67 in damages found by the jury for this cause of action, or \$52,608.36. The City contended that the proper calculation of interest was based not on the full \$110,166.67 of damages found by the jury, but on \$50,166.67, the amount remaining after deducting the \$60,000 insurance payment. The trial court agreed with the City and awarded Herrera \$23,956.30 in prejudgment interest.

Herrera contests this offset as unauthorized, relying on *Holtz v. San Francisco Bay Area Rapid Transit Dist.* (1976) 17 Cal.3d 648 and *Palomar Grading & Paving, Inc. v. Wells Fargo Bank, N.A.* (2014) 230 Cal.App.4th 686, 688. Those cases confirm the right to prejudgment interest, but they do not address the question of whether a court can base its calculation on the amount of damages determined by the jury or the amount recoverable by the plaintiff. Plaintiff offers no authority, constitutional or otherwise, that prohibits the court from awarding prejudgment interest on the amount deemed actually recoverable.

Disposition

The judgment and postjudgment order are affirmed. Costs on appeal are awarded to plaintiff Herrera. (§ 1036.)

ELIA, ACTING P. J.

WE CONCUR:

BAMATTRE-MANOUKIAN, J.

MIHARA, J.